



December 22, 2017

VIA ELECTRONIC SUBMISSION

National Freedom of Information Officer
U.S. Environmental Protection Agency
<https://foiaonline.regulations.gov>

**RE: Freedom of Information Act Request Regarding New Source Review
Memorandum**

Dear National FOI Officer:

This is a request for information on behalf of Earthjustice, Sierra Club, Natural Resources Defense Council ("NRDC"), and Environmental Defense Fund ("EDF") (collectively, "Public Interest Organizations") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Environmental Protection Agency's ("EPA") FOIA regulations, 40 C.F.R. § 2.100 *et seq.*

The Public Interest Organizations also request a fee waiver for this request under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107.

I. Records Requested

The Public Interest Organizations request all records created, stored, or received since January 20, 2017 concerning EPA review and reconsideration of the New Source Review ("NSR") program.¹

This request includes the following categories of records:

1. All records created, stored, or received by the EPA Administrator, any staff of the EPA Office of the Administrator,² Assistant Administrator William Wehrum, Senior Policy Advisor Mandy Gunasekara, or any staff of the EPA Office of Air and Radiation concerning the December 7, 2017 EPA Memorandum titled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-

¹ See 42 U.S.C. §§ 7470-7515.

² "Staff of the EPA Office of the Administrator" includes, but is not limited to, Henry Darwin, Byron Brown, Kevin Chmielewski, Alex Dominguez, Nicholas Falvo, Hayley Ford, Sarah Greenwalt, Mandy Gunasekara, Michelle Hale, Millan Hupp, Albert "Kell" Kelly, Forrest McMurray, Madeline Morris, Charles Munoz, and Ken Wagner.

Projected-Actual Applicability Test in Determining Major Modification Applicability” (hereinafter, “Policy Memorandum”) or the development of that Policy Memorandum.

2. All records created, stored, or received by the EPA Administrator, any staff of the EPA Office of the Administrator, Assistant Administrator William Wehrum, Senior Policy Advisor Mandy Gunasekara, or any staff of the EPA Office of Air and Radiation regarding any potential forthcoming EPA guidance or rulemakings concerning the NSR program;
3. All records created, stored, or received by the EPA Administrator, any staff of the EPA Office of the Administrator, Assistant Administrator William Wehrum, Senior Policy Advisor Mandy Gunasekara, or any staff of the EPA Office of Air and Radiation concerning EPA’s approach to enforcement of the NSR program or its requirements, exclusive of records concerning individual enforcement matters or investigations;
4. All records created, stored, or received by the EPA Administrator, any staff of the EPA Office of the Administrator, Assistant Administrator William Wehrum, Senior Policy Advisor Mandy Gunasekara, or any staff of the EPA Office of Air and Radiation concerning the NSR “task force” referenced by EPA Administrator Scott Pruitt during a September 19, 2017 interview with Dana Perino of Fox News at the Concordia Annual Summit in New York³ (hereinafter, “NSR Task Force”), including, but not limited to, any document identifying the membership or any meetings of the NSR Task Force, any notes of any meeting of the NSR Task Force, and any reports or recommendations issued by the NSR Task Force; and
5. All records reflecting communications between EPA and DTE Energy Co., DTE Electric Co., the law firm Hunton & Williams LLP or any lawyer of that firm, and/or any other entity or individual representing DTE Energy Co. or DTE Electric Co., including communications on which EPA employees were merely cc’ed, concerning:
 - a. The Policy Memorandum;
 - b. The DTE Energy Co. litigation encompassing the appellate decision *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and the resultant Petition for Writ of Certiorari, Case No. 17-170, *DTE Energy Co., et al. v. United States*; and/or
 - c. The NSR Task Force.
6. All records reflecting communications between EPA and Luminant Generation Company LLC, Big Brown Power Company, LLC, Energy Future Holdings Corp., Vistra

³ Jennifer Lu, Bloomberg BNA, “Pruitt Eyes Changes to Air Pollution Permitting Regime”, Sept. 20, 2017, available at <https://www.bna.com/pruitt-eyes-changes-n57982088234/>.

Energy Corp., the law firms Gibson Dunn & Crutcher LLP and/or Balch & Bingham LLP or any lawyer of those firms, and/or any other entity or individual representing Luminant Generation Company LLC, Big Brown Power Company, LLC, Energy Future Holdings Corp., or Vistra Energy Corp., including communications on which EPA employees were merely cc'ed, concerning:

- a. The Policy Memorandum; and/or
 - b. The NSR Task Force.
7. All records reflecting communications between EPA and Union Electric Co., Ameren Missouri, the law firms Schiff Hardin LLP, Armstrong Teasdale LLP, Brydon, Swearingen & England PC, Smith Lewis LLP or any lawyer of those firms, and/or any other entity or individual representing Union Electric Co. or Ameren Missouri, including communications on which EPA employees were merely cc'ed, concerning:
- a. The Policy Memorandum; and/or
 - b. The NSR Task Force.

For purposes of this request, the term "records" means information of any kind, including, but not limited to, documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. As used herein, "and" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these requests any information which might be deemed outside their scope by any other construction.

Further, for purposes of this request, the term "records" includes any personal email messages, telephone voice mails or text messages, and internet "chat" or social media messages, to the full extent that any such messages fall within the definition of "agency records" subject to FOIA, 5 U.S.C. § 552.

We remind you that FOIA requires that you respond within 20 working days of your receipt of this request, *see* 5 U.S.C. § 552(a)(6)(A)(i), and that that response must "at least indicate within the relevant time period the scope of the documents [you] will produce and the exemptions [, if any, you] will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. F.E.C.*, 711 F.3d 180, 182-83 (D.C. Cir. 2013).

We ask that you disclose this information as it becomes available to you without waiting until all of the communications and records have been assembled for the time period requested. The Public Interest Organizations request electronic copies of the records whenever possible.

II. Claims of Exemption from Disclosure

If EPA regards any documents as exempt from required disclosure under the Freedom of Information Act, please identify each allegedly exempt record in writing, provide a brief description of that record, and explain the agency's justification for withholding it. This explanation should take the form of a *Vaughn* index, as described in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and other related cases. If a document contains both exempt and non-exempt information, please provide those portions of the document that are not exempted from disclosure.

III. Fee Waiver

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107, the Public Interest Organizations request that EPA waive all fees associated with responding to this request because the groups seek this information in the public interest and will not benefit commercially from this request. If EPA does not waive the fees entirely, the Public Interest Organizations request that it reduce them to the extent possible.

FOIA provides that fees shall be reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."⁴ EPA's FOIA regulations contain an identical requirement.⁵ The U.S. Department of Justice (DOJ) has identified six factors to assess whether a requester is entitled to a waiver of fees under FOIA, and the D.C. Circuit and other Courts of Appeals—as well as EPA's own regulations—reference and apply these factors.⁶ These factors are:

A. Disclosure of the Information 'is in the Public Interest Because it is Likely to Contribute Significantly to Public Understanding of the Operations or Activities of the Government.'

(1) **The subject of the request:** Whether the subject of the requested records concerns 'the operations or activities of the government';

⁴ 5 U.S.C. § 552(a)(4)(A)(iii).

⁵ 40 C.F.R. § 2.107.

⁶ See, e.g., Stephen J. Markman, U.S. Dep't of Justice, FOIA Update, Vol. VIII, No. 1, New Fee Waiver Policy Guidance at 3-10 (1987), available at <https://www.justice.gov/oip/blog/foia-update-new-fee-waiver-policy-guidance>; *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (stating that "for a request to be in the 'public interest,' four criteria must be satisfied," and citing agency's multi-factor fee waiver regulation); 40 C.F.R. § 2.107.

- (2) **The informative value of the information to be disclosed:** Whether the disclosure is 'likely to contribute' to an understanding of government operations or activities;
 - (3) **The contribution to an understanding of the subject by the general public likely to result from disclosure:** Whether disclosure of the requested information will contribute to 'public understanding'; and
 - (4) **The significance of the contribution to public understanding:** Whether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities.
- B. Disclosure of the Information 'is Not Primarily in the Commercial Interest of the Requester.'
- (1) **The existence and magnitude of a commercial interest:** Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
 - (2) **The primary interest in disclosure:** Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.'⁷

The Public Interest Organizations' request complies with each of the factors agencies weigh in a fee waiver determination, as demonstrated below. If this information is not sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

A. Public Interest Factor

The disclosure of this information is in the "public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government."⁸ The Public Interest Organizations' request complies with each of the criteria DOJ has identified for the public interest factor.

i. The request concerns the operations or activities of the government.

⁷ Markman, *supra* note 6.

⁸ See 40 C.F.R. § 2.107(l)(1).

The Public Interest Organizations seek information related to EPA's review and reconsideration of the NSR program. Since EPA is an arm of the federal government, such EPA records plainly concern "operations or activities of the government."⁹

ii. The disclosure is "likely to contribute" to an understanding of government operations and activities.

The records the Public Interest Organizations have requested bear upon EPA's pending review and reconsideration of the NSR program, as well as any communications between EPA and outside entities about those matters. The scope, timing, or substance of EPA's reconsideration process is not public knowledge, nor has EPA made public any communications with DTE Energy Co. (and/or other outside entities) regarding such review and reconsideration of the NSR program or the decision to engage in such review and reconsideration. Thus, disclosure is "likely to contribute" to public understanding of government operations and activities.¹⁰

iii. The information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.

This information will contribute to the understanding of a reasonably broad audience of persons interested in the subject.¹¹ Recent media reports have already drawn public scrutiny to recent efforts to roll back and/or decrease enforcement of safeguards that protect human health and the environment, including those concerning NSR.¹² Thus, the non-public records concerning this topic that the Public Interest Organizations are requesting will attract interest from a broad audience of Americans.

The Public Interest Organizations are particularly able to ensure that the information requested will be disseminated to the general public.

Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all

⁹ See *id.* § 2.107(l)(2)(i).

¹⁰ See 40 C.F.R. § 2.107(l)(2)(ii).

¹¹ See *id.* § 2.107(l)(2)(iii).

¹² See, e.g., Eric Lipton & Danielle Ivory, NY Times, *Under Trump, E.P.A. Has Slowed Actions Against Polluters, and Put Limits on Enforcement Officers*, Dec. 10, 2017, available at https://www.nytimes.com/2017/12/10/us/politics/pollution-epa-regulations.html?rref=collection%2Fsectioncollection%2Fpolitics&action=click&contentCollection=politics®ion=stream&module=stream_unit&version=latest&contentPlacemnt=1&pgtype=sectionfront; Sean Reilly, E&E News, *Pruitt backs off enforcement of power plant program*, Dec. 8, 2017, available at <https://www.eenews.net/stories/1060068533>; Nadja Popovich & Livia Albeck-Ripka, NY Times, *52 Environmental Rules on the Way Out Under Trump*, Oct. 6 2017, available at <https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html>; Jennifer Lu, Bloomberg BNA, *"Pruitt Eyes Changes to Air Pollution Permitting Regime"*, Sept. 20, 2017, available at <https://www.bna.com/pruitt-eyes-changes-n57982088234/>.

people to a healthy environment.¹³ Earthjustice has made safeguarding the nation's air one of its top priorities. To this end, Earthjustice has brought numerous lawsuits to enforce the Clean Air Act in the public interest. In light of its substantial legal expertise, Earthjustice is well-prepared to analyze and evaluate the records we receive pursuant to this request and assess them in the context of the statutory mandates of the Clean Air Act. In addition, Earthjustice has the "ability and intention" to convey this information to the public.¹⁴ Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves approximately 223,000 subscribers, and it can utilize its online action alert system to urge members of the public to contact policymakers and ask them to take action based on information received from this request; typically, 15,000 to 20,000 individuals respond to such alerts. Earthjustice's communications staff can disseminate newsworthy information obtained from this request to the media.

The Sierra Club is the nation's oldest and largest grassroots environmental organization, with more than 3 million members and supporters, including online activists and newsletter subscribers. Its website is highly trafficked and Sierra Club media and communications reach hundreds of thousands of people through an extensive digital communications network and online information system, print magazine, radio show, web videos, and news reports.

Founded in 1970, NRDC is one of the nation's leading environmental non-profits. NRDC works to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. NRDC has extensive communications capabilities and reaches supporters through its highly trafficked website, staff blogs, Activist email list, social media accounts, press releases, issue papers, and reports.

EDF is a leading environmental non-profit with more than 2 million members and supporters. For the last 50 years, EDF has worked to preserve the natural systems on which all life depends. EDF routinely issues press releases, action alerts, reports, analyses, and other public outreach materials. It communicates directly with its members and supporters, as well as to its more than 300,000 followers on Facebook and 168,000 followers on Twitter. It has also established a website to feature materials released under its FOIA requests¹⁵ and fully intends to disseminate information released through this request.

The Public Interest Organizations each have the ability to digest and quickly disseminate information gleaned from FOIA requests to the general public. The Public Interest Organizations will make any newsworthy information or documents received in response to this request publicly available and will use them as a basis for further action regarding changes to the NSR program. Thus, the Public Interest Organizations are uniquely well positioned to analyze and publicize the requested information.

¹³ See <http://earthjustice.org/about>.

¹⁴ See, e.g., Markman, *supra* note 6.

¹⁵ See EDF, *Promoting Government Transparency*, <https://www.edf.org/climate/promoting-government-transparency>.

iv. The information will contribute “significantly” to public understanding of government operations or activities.

The information the Public Interest Organizations seek will contribute “significantly” to the ongoing public conversation about EPA’s NSR-related regulatory rollbacks and reduced enforcement efforts.¹⁶ None of the materials the groups have requested are now widely known (if they have been made public at all), yet they are essential to the public’s understanding of EPA’s review and reconsideration of the NSR program. As discussed above, the Public Interest Organizations will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy, including in any future public proceedings concerning the NSR program. Releasing this information will, thus, significantly enhance public understanding of any EPA activities concerning review and reconsideration of the NSR program.

B. Commercial Interest Factor

Public Interest Organizations are non-profit organizations with no commercial, trade, or profit interests in the requested information. Public Interest Organizations seek to use this information solely to inform the public and to support advocacy efforts around protecting human health and the environment through a robust NSR program. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

For all of the foregoing reasons, a fee waiver is warranted here under 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107. If EPA does not believe that the above information is sufficient to justify a fee waiver, please contact us for further documentation before deciding upon the waiver request.

* * *

Thank you for your assistance processing this request. Please contact me at the email or telephone number below if you have any questions or concerns about this request for information.

Sincerely,

A handwritten signature in black ink, appearing to read 'L K Perfetto', with a long horizontal stroke extending to the right.

Lisa K. Perfetto
Earthjustice

¹⁶ See 40 C.F.R. § 2.107(l)(2)(iv).

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Submitted on behalf of:

Earthjustice
Sierra Club
Natural Resources Defense Council
Environmental Defense Fund